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WORKER'S COMPENSATION: THIRD PARTY ACTIONS AGAINST EMPLOYERS UNDER COMPARATIVE CAUSATION

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I. INTRODUCTION

THE APPEARANCE of worker's compensation systems heralded a new day for the industrial worker. These systems now serve employees by guaranteeing to them a quick, simple, effective, and relatively inexpensive means for obtaining compensation following a job-related injury.[1] Inherent in the worker's compensation scheme, however, is the recognition that the no-fault benefits conferred upon the worker are in lieu of damages that might be obtained in a common law action and are neither designed nor intended to compensate the injured employee fully for his injuries.[2] Unfortunately, benefits have not kept pace with rising inflation, or even with wages. One result has been an increase in the number of suits brought by injured workers against third parties alleged to be at fault.[3] Predictably, the third party alleges that the em-

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[1] E. I. Du Pont De Nemours & Co. v. Frechette, 161 F.2d 318 (8th Cir. 1947) (applying Minnesota law); Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); Woolsey v. Panhandle Refining Co., 131 Tex. 449, 116 S.W.2d 675 (1938); Texas Employers' Ins. Ass'n v. Wright, 128 Tex. 242, 97 S.W.2d 171 (1936). *See also infra* note 78.

[2] James Stewart & Co. v. Law, 228 S.W.2d 601, 608 (Tex. Civ. App. — Waco), *aff'd*, 149 Tex. 392, 233 S.W.2d 558 (1950); Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 P. 256 (1916).

[3] In the past, many states required the injured worker to make an election between worker's compensation benefits and third party litigation. By 1977, every state except

ployer was responsible for all or part of the employee's injury and seeks contribution and indemnity. In these instances, the rights of the employee, employer, insurance carrier or state fund,[4] and the third party must all be balanced, a process that has led to a wide variety of results in the courts.

Although courts have reached different results through balancing the parties' interests, there has been nearly uniform agreement that the employee should not receive a double recovery, and considerable agreement that the employer or its carrier should recover compensation payments made to the employee if the employer is without fault. There is limited, if any, agreement, however, regarding the rights of the third party to recover from the employer who has contributed to the injury. In this article we will examine the competing interests in third party actions in the worker's compensation setting. We will advance an argument for the adoption of the doctrine of comparative causation to determine the liability of all parties and distribute the loss among them equitably, whether they are situated within or without the worker's compensation system. Before doing so, however, it is necessary to examine both the common law and statutory underpinnings of the contemporary worker's compensation system.

II. WORKER'S REMEDIES AT COMMON LAW

Prior to the enactment of worker's compensation laws, a worker's sole remedy for injury was a common law action in tort.[5] From start to finish, the worker's road to recovery was

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one permitted the worker to pursue both remedies. J. CHELIUS, WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION 27 (1977) [hereinafter cited as CHELIUS].

[4] In forty-four states, employers may purchase worker's compensation coverage from private insurance carriers. In all but four states, employers may self-insure the exposure if requisite financial responsibility is met. Eighteen states operate state funds, but twelve of these allow competition from insurance carriers. Of the states which bar private carriers, three allow eligible employers to self-insure. Private insurance carriers are responsible for about 63 percent of all benefits paid, self-insurers for 14 percent, and state funds for 23 percent. J. BURTON, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAW 33 (1972) [hereinafter cited as REPORT].

[5] Only the injured worker had a cause of action for his injuries. If he died, the

long and arduous. First, the employee had to sue his employer, the man upon whom he depended for his bread; next, his lawyer had to frame the complaint within the narrow boundaries of the available forms of action. The employee then had to persuade a reluctant fellow worker to testify in court against their employer; and once in court, the employee had the burden of proving his case while negating the employer's defenses. Even if a verdict was returned for the worker, he was usually left with the barest of recoveries, so-called "windfall" or "runaway" verdicts being virtually unknown in rigidly conservative Victorian England and nineteenth century America.

To be sure, standards of conduct were imposed upon the employer as well as the employee, but the burden of meeting these standards fell most heavily on the latter. The employer's basic duty was due care for his employee.[6] In addition, he was required to employ a sufficient number of qualified employees, supply them with safe tools and equipment to perform the tasks assigned, set out and enforce rules for the conduct of the business, and warn of danger not readily apparent to the workers.[7] Nevertheless, an employer who failed to meet these standards was usually able to cloak himself in that "unholy trinity of defenses"[8] — contributory negligence, the fellow servant rule, and the assumption of risk doctrine.

The legal roots of the trinity are strong indeed. The doctrine of contributory negligence was first announced in *Butterfield v. Forrester*.[9] In *Butterfield*, plaintiff and his horse collided with a pole that defendant had placed across part of the road to facilitate repairs he was making to his house nearby. Although there was no evidence that plaintiff was in-

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survivors had no cause of action for his death.

[6] A higher standard of care was imposed as the hazard inherent in the industry increased, e.g., the railroad and mining industries.

[7] Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 225 (1952) [hereinafter cited as Larson].

[8] H. SOMERS AND A. SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 18 (1954) [hereinafter cited as SOMERS].

[9] 11 East. 60, 103 Eng. Rep. 926 (1809).

toxicated, the accident occurred soon after plaintiff left a public house, and a witness testified that he "was riding violently." Further, the witness testified that the obstruction could be seen from a distance of one hundred yards. Judge Bayley instructed the jury that "if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant."[10] The jury returned a defense verdict.

In 1837, the fellow servant or common employment doctrine emerged in *Priestly v. Fowler*[11] as an exception to the long established rule of the master's vicarious liability. In *Priestly*, a boy sued his master, a butcher, for injury suffered when an overloaded cart broke down.[12] Upon proof that the breakdown resulted from the negligence of a fellow servant, Lord Abinger barred the butcher boy's recovery cataloguing with great alarm the possible consequences if the case were decided for the boy:

> If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen: of the butcher, in supplying the family with meat of a quality injurious to the

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[10] *Id.* at 60-61, 103 Eng. Rep. at 927.
[11] 3 M. & W. 1, 150 Eng. Rep. 1030 (1837).
[12] *Id.* at 1-4, 150 Eng. Rep. at 1030-31.

> health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.[13]

Given the absence of cited authority in Lord Abinger's opinion, one is free to speculate on the principles underlying the doctrine. Commentators have advanced a variety of explanations. Dodd, for example, suggests that the collective desire of the judiciary to promote industrial expansion and success impelled the decision.[14] Hanes believes that the decision was bottomed upon a public policy desire to "avoid the imposition of a crippling liability on the still young industrial revolution."[15] Downey notes the prevalent laissez-faire attitude at the time.[16] Levy has suggested that Lord Abinger's political prejudices and party considerations affected his decision.[17] Finally, Larson[18] believes the real reason for the rule is best stated in a later American decision which held that "considerations of policy and general expediency" required it, and that holding otherwise "would not conduce to the general good."[19] Whatever the reasons, the decision was widely followed in England and the United States for the next three-quarters of a century.

The assumption of risk doctrine also developed from the concepts found in the *Priestly* case. In that decison, with remarkable insensitivity to the employment climate of the day, Lord Abinger intoned that "[t]he servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."[20] One

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[13] *Id.* at 5-6, 150 Eng. Rep. at 1032.

[14] W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936).

[15] D. HANES, THE FIRST BRITISH COMPENSATION ACT, 1897 12 (1968) [hereinafter cited as HANES].

[16] E. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA (1912).

[17] 1 A. WILSON AND H. LEVY, WORKMEN'S COMPENSATION 25 n.2 (1939).

[18] Larson *supra* note 7, at 223.

[19] Farwell v. Boston & Worchester R.R. Corp., 45 Mass. 49, 61 (4 Met. 49) (1842).

[20] Priestly v. Fowler, 150 Eng. Rep. 1030, 1032-33 (1837).

need not be a keen student of nineteenth century English history to sense that the servant did not bargain at arm's length with his master; that there was a dearth of jobs and a surfeit of labor; and that the hazards and risks of railroad, mine, and factory were not fully disclosed to the servant by the master. Nevertheless, contributory negligence, the fellow servant rule, and the assumption of risk were quickly imported to the United States.

The contributory negligence doctrine of *Butterfield* was adopted by the Vermont court in *Robinson v. Cone.*[21] Citing *Butterfield*, the court held that "[o]ne person being in fault will not dispense with another's using ordinary care for himself."[22] The fellow-servant rule and assumption of risk doctrine of *Priestly* became firmly implanted in American jurisprudence with Chief Justice Shaw's opinion in *Farwell v. Boston and Worcester R.R. Corp.*[23] In *Farwell*, a railroad was held immune from liability to its locomotive engineer who suffered the loss of a hand in an accident caused by the negligence of its switchman.[24] The decision was cited widely in the United States, and as if in a judicial exchange for *Priestly*, was cited by many English courts as well.

The assumption of risk doctrine enjoyed undiminished vitality in the workplace nearly a century after *Priestly*. For example, the court in *Wager v. White Star Candy Co.*,[25] on particularly egregious facts, denied recovery by a girl who contracted tuberculosis as a result of working in a candy company's damp, unsanitary, and unventilated cellar, stating:

> The plaintiff was fully aware of the conditions under which she worked, and continued in the employment from June to December in spite of such knowledge. It is from her testimony that we learn that the walls of the cellar were wet to the touch; that a cesspool backed up liquids which wet the floor; that the cellar was devoid of windows to light or air it; that dead rats

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[21] 22 Vt. 213 (1850).

[22] *Id.* at 221 (citing Butterfield v. Forrester, 11 East 60, 60-61, 103 Eng. Rep. 926, 927 (1809)).

[23] 45 Mass. 49 (4 Met. 49) (1842).

[24] *Id.*

[25] 217 A.D. 316, 217 N.Y.S. 173 (1926).

> were left about; that the odors were vile; that no fires were kept in the upstairs room; that the plaintiff worked in a drafty place; that the upstairs room was damp. It is common knowledge that such conditions are deleterious to health. The plaintiff was chargeable with such knowledge. We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment, and that the recovery may not stand.[26]

Notwithstanding decisions such as *Farwell*, *Robinson* and *Wager*, some judicial amelioration of the common law was already occurring. Larson notes that the principal modification of the common law defenses was the adoption of the "vice-principal" exception to the fellow-servant rule.[27] Under the exception, certain common law duties of the employer were held to be non-delegable duties; e.g., the duties to provide tools and competent workmen, the duty to warn against hazards, and the like. Additionally, a foreman responsible for discharging his employer's non-delegable duties was excluded from the fellow-servant category. Thus, an action by an employee against a foreman for negligence in discharging the employer's duties would not be barred from the fellow-servant rule. This limited exception was adopted in some jurisdictions. More commonly, however, the "vice-principal" exception was broadly construed to exclude all employees responsible for discharging the employer's non-delegable duties from the fellow-servant category. The second judicial undercutting occurred in cases holding that the employee did not assume the risk of his employer's violation of a safety statute. Finally, the courts in three states limited the defense of contributory negligence solely to the mitigation of damages. Nevertheless, the concept of no liability without fault permeated the law to such an extent that the majority of judicial decisions continued to hold against the worker. Unfortunately, even as the toll of adverse judicial decisions was rising arithmetically, the toll of death and physical injuries was soaring geometrically. The mounting injuries coupled with constant defeat in the courts

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[26] 217 N.Y.S. at 175.

[27] Larson, *supra* note 7, at 225-26.

impelled the workers to lay their demands for redress directly at the feet of the lawmakers.

III. STATUTORY MOVEMENT TOWARD WORKER'S COMPENSATION

A. *European Beginnings*

The first legislative adoption of a form of worker's compensation occurred in Prussia, in 1838,[28] with the passage of a statute making the railroads liable to employees as well as passengers for all accidents unless caused by the person injured or by an act of God. In 1854, another statute was enacted requiring participation by certain classes of employers in local "sickness associations."[29] The modern worker's compensation system appeared on July 6, 1884,[30] with the enactment of various provisions in the Compensation Bill introduced in the Reichstag by Bismarck[31] in 1881. Although its introduction was motivated in part by altruism and the collective urging of the social philosophers of the day,[32] the bill largely was intended to blunt the electoral successes of the growing Marxist movement.[33] The plan required employee as well as employer contribution to a sickness and accident fund administered by representatives of each group under central government supervision.[34] "In short, [it] was a compulsory system based upon mutual association."[35] The impact of Bismarck's bill can be measured by the fact that a worker's com-

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[28] C. WILLIAMS, JR. & P. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION 15 (1973) [hereinafter cited as COMPENDIUM].

[29] FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR OF THE UNITED STATES 35 (1893) [hereinafter cited as FOURTH SPECIAL REPORT].

[30] Larson, *supra* note 7, at 229.

[31] Prince Otto Eduard Leopold von Bismarck, First Chancellor of the German Empire, 1871-1890; known as the "Iron Chancellor."

[32] The principal philosophers being Lassalle, Sismondi, Winkelblech, Wagner and Schaeffle. *See* FOURTH SPECIAL REPORT, *supra* note 29, at 20-26.

[33] Larson, *supra* note 7, at 229.

[34] Today, East Germany has a social insurance system that is essentially the same as the original system, which required contributions by employer and employee. The West German system is compulsory and is funded exclusively by employer contributions to a semiprivate insurance carrier. *See* COMPENDIUM, *supra* note 28, at 15.

[35] *Id.*

pensation system was adopted by every European nation within the next quarter-century.[36]

B. *British Legislation*[37]

Great Britain took its first hesitant step toward a worker's compensation system with the passage of the Employer's Liability Act by Parliament in 1880.[38] Unlike Germany, the motivation for passage of the Act was neither altruism nor a serious Marxist threat, but rather the demands of the working class of England who rose united in protest against the harshness of the common law. Although the Act was a step forward, it did little more than return the worker to the same position enjoyed by a stranger who was injured by the negligence of the employer or his employees.[39]

By 1880, many British workers had formed "friendly societies,"[40] which bore a resemblance to the sickness associations in Germany. These "societies" were compensation insurance pools that provided funds, irrespective of fault, to the injured worker or his dependents in the event of death or disability.[41] The uncertainties of exposure to liability following passage of the Employer's Liability Act in 1880 prompted many employers to make contributions to the friendly societies, but the *quid pro quo* exacted was the forbearance of the worker's right to institute a suit under the Act.[42] The act of forbearance became known as "contracting out."[43]

In *Griffiths v. Earl of Dudley*[44] the "right" of a worker to contract outside of the Act was upheld.[45] The "victory" by the

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[36] *Id.* at 29.

[37] For an excellent discussion of the evolution of the British system through the Workmen's Compensation Act of 1897, see HANES, *supra* note 15.

[38] Employer's Liability Act, 1880, 43 & 44 Vict., ch. 42 (sometimes referred to as the Gladstone Act, after William E. Gladstone, British Prime Minister, 1868-1874, 1880-1885; 1886; 1892-1894).

[39] More will be said later of the common law's inequities, inadequacies, and inconsistencies.

[40] HANES, *supra* note 15, at 22.

[41] *Id.*

[42] *Id.* at 23.

[43] *Id.*

[44] 9 Q.B.D. 357 (1881).

[45] *Id.*

British worker, however, was a hollow one as an action under the Act held little promise of succor to the injured worker. For example, in 1890, 389 cases were tried under the Employer's Liability Act, of which 208 resulted in plaintiff's verdicts for an average of 41 pounds per case.[46] As with a suit at common law, the worker usually obtained only the barest recovery for his trouble, and was left doubly disadvantaged by his injury and the enmity of his employer whom he sued under the Act. Accordingly, the British worker's preference for the friendly societies over an action under the Act and his growing attraction to the notion of compensation without fault are readily understandable.

By 1892, both Liberals and Conservatives were committed to a modification of the Employer's Liability Act.[47] In February, 1893, an expanded employer's liability bill was introduced in the House of Commons,[48] but the bill failed.[49] Following the failure, the energies of the bill's supporters turned to passage of a worker's compensation plan.[50] The people demanded it; the government had promised it;[51] and ultimately, it was delivered in the Workman's Compensation Act of 1897.[52] Passage of the Act was a public affirmation of the theory that the cost of industrial injuries should be borne by the master through the cost of his product in order to distribute more equitably the burdens imposed by the hazards inherent in an industrial society. In short, in a phrase widely ascribed to Lloyd George,[53] "[t]he cost of the product should bear the blood of the workingman."

The Act differed from the German and continental schemes in that the plan was elective; its administration was vested in the courts; and insurance for its benefit payments was placed

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[46] HANES, *supra* note 15, at 24-25.

[47] *Id.* at 57.

[48] *Id.*

[49] For a thorough examination of the reasons for the bill's failure, see HANES, *supra* note 15, ch. 5.

[50] *Id.* at 87.

[51] *Id.* at 106.

[52] Workman's Compensation Act, 1897, 60 & 61 Vict., ch. 37.

[53] David Lloyd George, British Prime Minister, 1916-1922.

in the private sector.[54] Although limited to certain industries, in the industries in which it applied, the Act required the employer to pay for all accidents resulting in more than two weeks disability, except those involving the willful misconduct of the injured worker.[55] The Act was extended by amendment in 1906 to include all workers except casual and out-workers.[56]

Further serious scrutiny of the underlying philosophy of the worker's compensation system was undertaken in 1920 by the Holman-Gregory Committee.[57] The Committee concluded that the voluntary system of private enterprise compensation should not be replaced by a compulsory state scheme. By 1946, however, the philosophy of both the government and workers had changed sufficiently to compel the enactment of the National Insurance Act.[58] The Act removed control of worker's compensation from the insurance companies and private agencies and placed it in the hands of the government.[59] In 1965, by legislation enacted closely resembling Bismarck's original German plan, coverage was extended to all workers. Today, contributions to the fund are made equally by the employee and employer, with the government also making a small contribution.[60]

C. *United States Progress*

The first American employer's liability statute, enacted in Georgia in 1855, abolished the fellow servant rule in the railroad industry.[61] Even though many of the states that soon followed Georgia's legislative lead broadened the application of their statutes, none abrogated all three of the employer's defenses for every employer-employee relationship.[62] By 1907, twenty-six states had employer liability acts.[63] Most acts abro-

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[54] SOMERS, *supra* note 8, at 30.
[55] COMPENDIUM, *supra* note 28, at 15-16.
[56] *Id.* at 16.
[57] *Id.*
[58] National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, ch. 62.
[59] COMPENDIUM, *supra* note 28, at 16.
[60] *Id.*
[61] 1855 Ga. Laws. 155.
[62] COMPENDIUM, *supra* note 28, at 13.
[63] *Id.*

gated the fellow servant rule, and some modified or limited the contributory negligence and assumption of risk doctrines.[64]

The first meaningful federal legislation was enacted under the leadership of President Theodore Roosevelt. The Federal Employers' Liability Act of 1908 (FELA),[65] provided coverage to all employees of common carriers engaged in interstate and foreign commerce. For all of the benefits the Act brought to the covered workers, its real value was the widespread attention it generated in state legislatures throughout the country on the plight of the workers. The celebrated Pittsburgh Survey, in 1909,[66] was the most forceful portrayal of the conditions under which some Americans labored. The opening sentence of the Survey recites the grim fact that 526 men were killed in work accidents in Allegheny County from July 1, 1906, to June 30, 1907. In one three-month period, another 509 were injured. In a single county, the loss of life and limb reached levels not recorded in a like time span even during modern war. The publication of the Survey, along with the stories and exposés appearing in the popular press of the day, did much to galvanize public opinion against the industrial slaughter that was taking place without surcease throughout the land.

In response to public demand for solutions and with the realization that the employer liability acts had done little to stem the tide of industrial accidents, state and federal commissions were formed throughout the country to investigate the problems and recommend solutions.[67] The findings of the commissions can generally be summarized as follows:[68]

1. An overwhelming percentage of industrial accidents

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[64] *Id.*

[65] 45 U.S.C.A. § 51 (West 1972).

[66] C. EASTMAN, WORK-ACCIDENTS AND THE LAW (1910).

[67] SOMERS, *supra* note 8, at 22. By 1910, commissions were created by the legislatures of Massachusetts, Minnesota, New Jersey, Connecticut, Ohio, Illinois, Wisconsin, Montana and Washington. Ultimately, forty investigative commissions in thirty-two jurisdictions were appointed. *Id.*

[68] *Id.* at 22-26 (construing W. DODD, ADMINISTATION OF WORKMEN'S COMPENSATION 19-26 (1936)).

were caused by hazards inherent in the occupation;

2. Legal actions by workers produced few victories; in those few, the awards were penurious;

3. A worker or his family was compensated, if at all, many years after the injury as a consequence of the delays occasioned by the slow moving legal process;

4. The liability protection purchased by the employer was burdened excessively by the cost of attorneys, claimsmen, administrative costs, and profit to the insurance company. After these costs were subtracted from the premiums paid, there was pitifully little left to compensate the worker;

5. The range of awards varied so widely from case to case that it was impossible to predict the amount of an award even upon similar facts;

6. Injured workers or families who received little or no compensation frequently became public charges or were forced to seek private relief from religious organizations, relatives, or friends;

7. The requirement that a worker sue his employer frequently necessitated the testimony of a fellow worker, which greatly exacerbated the tension and unrest that already existed throughout industry.

Based upon these findings, the commissions recommended the enactment of compensation legislation premised on the concept of liability without fault.[69] Although there was by no means a universal consensus among the commissions on each and every element to be included in the bill, it is fair to say that the commissions uniformly recommended that a worker's compensation law, in substance, should:[70]

1. provide sure, prompt, and reasonable income and medical benefits to work-accident victims or income benefits to their dependents, regardless of fault;[71]

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[69] SOMERS, *supra* note 8, at 22.

[70] UNITED STATES CHAMBERS OF COMMERCE, ANALYSIS OF WORKER'S COMPENSATION LAWS vii (1980) [hereinafter cited as Chambers of Commerce]. For other formulations, see generally CHELIUS, *supra* note 3, ch. 1; COMPENDIUM, *supra* note 28, ch. 3; REPORT, *supra* note 4, at 35; SOMERS, *supra* note 8, ch. 2.

[71] *See* Pacific Freight Lines v. Industrial Accident Comm'n, 26 Cal. 2d 234, 157 P.2d 634 (1945); Vanadium Corp. of America v. Sargent, 134 Colo. 555, 307 P.2d 454

2. provide a single remedy and reduce court delays, costs, and work loads arising out of personal injury litigation;[72]

3. relieve public and private charities of financial drains—incident to uncompensated industrial accidents;

4. eliminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals;[73]

5. encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism [that provides for proper cost allocation]; and

6. promote frank study of causes of accidents (rather than concealment of fault)—reducing preventable accidents and human suffering.

State legislatures responded without delay. In 1909, Montana enacted a worker's compensation act, although it was limited to coal mining.[74] By 1910, the American Federation of Labor, concerned about the shockingly high death and injury figures in the new century, abandoned attempts to strengthen employer liability laws in favor of worker's compensation legislation.[75] Surprisingly, a poll of manufacturers conducted by the National Association of Manufacturers revealed a "very large majority to be in favor of compensation legislation,"[76] and in 1910, the Association openly endorsed workers compensation.[77] With labor and management thus aligned, additional legislative action was to be forthcoming shortly. New York enacted the first worker's compensation act of general application in the same year;[78] however, the legislative response to public demand for worker's compensation laws was dealt a severe, albeit temporary, blow on constitutional grounds by the judiciary.[79] In *Ives v. South Buffalo Railway*

(1957); Woolsey v. Panhandle Refining Co., 131 Tex. 449, 116 S.W.2d 675 (1938).

[72] *See* Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 P. 256 (1916).

[73] *Id.*

[74] 1909 Mont. Laws, ch. 67.

[75] SOMERS, *supra* note 8, at 31.

[76] *Id.*

[77] COMPENDIUM, *supra* note 28, at 17.

[78] 1910 N.Y. Laws ch. 674.

[79] The Wisconsin Worker's Compensation Act passed in 1911 was the first to survive the initial constitutional challenge. In addition to Wisconsin, the following states passed worker's compensation legislation in 1911: California, Illinois, Kansas, Massa-

Co.,[80] the New York Court of Appeals branded the Act "plainly revolutionary" and held that it violated the due process clause of the New York and federal constitutions.[81]

In the wake of the *Ives* decision, New York and six states[82] amended their constitutions. Nevertheless, *Ives* unquestionably influenced the path of future legislation. In 1911, nine states sought to write around *Ives* by passing non-compulsory laws that permitted employees to "elect" whether to participate in the worker's compensation system.[83] Of those states, only Washington enacted a compulsory statute. In the constitutional challenge that followed the passage of the Act, the Washington Supreme Court expressly rejected *Ives* and upheld the statute as a valid exercise of the police power of the state.[84] By 1915, thirty states had enacted worker's compensation laws.

The lingering issue of constitutionality was finally put to rest by the United States Supreme Court in 1917 in a trilogy of cases that upheld the New York compulsory law,[85] the Iowa elective law[86] and the Washington exclusive state insurance fund.[87] In each case, the Court held that the police power of the state was paramount, and the acts were not violative of the due process and equal protection clauses of the Fourteenth Amendment. Thus the constitutionality of compensation without fault was finally given the nation's highest judicial sanction, although the battle was not without cost as authors of one work have observed:

> When the Supreme Court finally ruled on the second New York compulsory law, it was clear that the destructive evasions of the elective law had been unnecessary. But by then it was

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chusetts, Nevada, New Hampshire, New Jersey, Ohio and Washington. W. SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 9, at 24 n.4 (1941).

[80] 201 N.Y. 271, 94 N.E. 431 (1911).

[81] 94 N.E. at 436, 440.

[82] Arizona, California, New York, Ohio, Pennsylvania, Vermont and Wyoming.

[83] Additionally, some states limited coverage to "hazardous" employments because of the uncertainty over how far coverage could be extended constitutionally.

[84] Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 P. 256 (1916).

[85] New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917).

[86] Hawkins v. Bleakly, 243 U.S. 210 (1917).

[87] Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917).

> too late. Elective laws have become institutionalized deadweights on the compensation program and they have proved remarkably resistant to alteration.[88]

By 1920, all but six states had passed worker's compensation legislation. With the passage of legislation by Mississippi in 1948, each of the forty-eight states had a worker's compensation law.[89] Today, every American jurisdiction including American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands has a worker's compensation law.[90] In addition, United States Government employees are covered under the Federal Employees' Compensation Act[91] and various maritime workers are covered under the Longshoremen's and Harbor Workers' Compensation Act.[92] By one estimate, more than eighty-seven percent of the entire labor force in the United States is covered by worker's compensation laws.[93]

How successfully the objectives of worker's compensation have been achieved over the past sixty to seventy years and whether reform is needed are subject to debate. Two recent studies have provided a forum for such discussions. In 1972, the National Commission on State Workmen's Compensation Laws made eighty-four recommendations for improvement, nineteen of which were termed "essential";[94] nevertheless, the Commission concluded that the system was fundamentally sound. Some recommendations have been adopted by various states. In 1976, the Inter-Agency Workers Compensation Task Force, comprised of representatives of several federal government agencies, recommended more "effective management at the state level, with the federal government monitoring progress and providing technical assistance."[95] Interestingly, both

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[88] SOMERS, *supra* note 8, at 33.

[89] *Id.* at 34.

[90] Each of the Canadian provinces and territories also has a compensation act or ordinance. CHAMBERS OF COMMERCE, *supra* note 70, at vii.

[91] 5 U.S.C.A. §§ 8101-8193 (West 1980).

[92] 33 U.S.C.A. §§ 901-950 (West 1978).

[93] CHELIUS, *supra* note 3, at 20.

[94] REPORT, *supra* note 4, at 45-52.

[95] CHAMBERS OF COMMERCE, *supra* note 70, at vii.

the National Commission[96] and the Task Force[97] rejected replacement of the state systems by a single federal program, although bills requiring federally mandated minimum standards for benefits had been introduced in Congress in the past.[98]

IV. THIRD PARTY ACTIONS

To understand fully third party actions in a worker's compensation setting, it is necessary to focus on the relationship between the employer and employee and briefly review the history and development of the doctrines of contribution and indemnity. At the inception of the employer-employee relationship, i.e. when the worker is hired, the employee, in some states, may elect to retain his right to common law remedies against the employer.[99] Usually, he does not retain the right, and it is thereby waived by statute if the employer subscribes to the worker's compensation system.[100] Conversely, there is no waiver if the employer is required but fails to subscribe to the worker's compensation plan, or if the employee expressly retains his common law rights.[101] If the employer has subscribed to the worker's compensation plan[102] and the em-

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[96] REPORT, *supra* note 4, at 26, 129-30.

[97] CHAMBERS OF COMMERCE, *supra* note 70, at vii.

[98] *Id.* To date, however, none has progressed beyond the committee level.

[99] *See, e.g.*, ME. REV. STAT. ANN. tit. 39, § 28 (1978); MASS. ANN. LAWS ch. 152, § 24 (Michie/Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 8306 § 3a (Vernon 1967) (notice of intention by employee to waive worker's compensation benefits and retain common law rights against the employer must be given to the employer in writing at the time the employee is hired).

[100] *See supra* note 99.

[101] In those jurisdictions that permit a worker to retain his common law right to bring suit against the employer, the waiver of the right should be based on more than the worker's failure to give the requisite statutory written notice. In today's industrialized society, it is neither realistic nor equitable to expect a worker to be independently aware of the notice he must give in order to retain his common law right. It may be argued, however, that the average worker cannot intelligently make a decision whether a waiver would be in his family's best interest by virtue of his lack of understanding of the common law right and/or worker's compensation benefits. Nevertheless, legislative reform in those states should include a requirement for a subscribing employer to provide the employee with notice of his right to accept the potential worker's compensation benefits or to retain the right to sue the employer for damages arising out of an employment-related injury.

[102] Only New Jersey, South Carolina, and Texas have elective systems. CHAMBERS

ployee has waived his common law remedy, a contract arises between the two parties limiting the worker's compensation to the benefits prescribed under the plan.

Today, most American jurisdictions make no provision for the employee's retention of common law rights but do make employer participation in the worker's compensation system compulsory. In short, as against the employer, the employee's exclusive remedy is worker's compensation. It is clear, however, that whether the relationship between the employer and employee is contractual or statutory, it cannot cut off the rights of a third party.[103] It is the definition and application of these "rights" that have given courts difficulty.

Contribution is an equitable doctrine which permits the burden of a loss, for which multiple defendants were equally and unintentionally responsible, to be jointly shared.[104] The case of *Merryweather v. Nixan*[105] is generally credited with the creation of the doctrine,[106] but the court, relying on the maxim "in pari delicto potior est conditio possidentis [defendentis],"[107] refused to allow contribution between intentional joint tortfeasors.[108] The language of the opinion was broad, but widely followed, particularly in the United States, where courts made no effort to distinguish between intentional and negligent conduct, but instead slavishly repeated that the law should not come to the aid of wrongdoers in adjusting losses between themselves.[109]

With each repetition of the rule, however, the courts be-

OF COMMERCE, *supra* note 70, at 3-4.

[103] Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 767 (Tex. 1964).

[104] *See* Ocean Accident & Guar. Corp. v. United States Fidelity & Guar. Co., 63 Ariz. 352, 162 P.2d 609 (1945); United States Fidelity & Guar. Co. v. Century Indem. Co., 78 S.W.2d 737 (Tex. Civ. App. — El Paso 1935, writ dism'd).

[105] 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). *See* Note, *Contribution Between Persons Jointly Charged for Negligence - Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

[106] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 305-06 (4th ed. 1971) [hereinafter cited as PROSSER].

[107] "Where the fault is mutual, the law will leave the case as it finds it." BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

[108] 8 Term Rep. at 186, 101 Eng. Rep. at 1338.

[109] *See, e.g.*, Berkson v. Kansas City Cable Ry. Co., 144 Mo. 211, 45 S.W. 1119, 1120 (1898).

came increasingly uncomfortable with it. So, too, did the legislatures, and eventually the doctrine began to falter.[110] It ultimately fell because of the inequities inherent in a system that permitted the entire loss to be borne by one tortfeasor where two or more were responsible. As Professor Prosser had urged, the allocation of loss should not be determined by the "accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer. . . ."[111] In short, the rule was not fair.

By 1980, nineteen states had adopted the Uniform Contribution Among Tortfeasors Act[112] or a version of it. In some states the initial adoption was judicial and preceded legislative codification; in all states the force behind its adoption has been the goal of equitable apportionment of loss.

Indemnity, like contribution, has long been a part of the common law,[113] finding its roots in equity.[114] Unlike contribution, however, indemnity permits the shifting of the entire loss from one tortfeasor to another who is also jointly and severally liable to the plaintiff. It is the payment of all of plaintiff's damages by one tortfeasor to another tortfeasor who has paid the plaintiff. Contribution has always meant "some"; and indemnity has always meant "all." Nevertheless, the difference between contribution and indemnity is arguably one of

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[110] *See generally* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 137-46 (1932).

[111] PROSSER, *supra* note 106, § 50, at 307.

[112] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 44 (Supp. 1981).

[113] In Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799), the court expressly disclaimed any effect its decision might have on traditional "cases of indemnity". *Id.*

[114]

> The duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus, the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case.

Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

degree. Judge Learned Hand perhaps said it best: "[I]ndemity is only an extreme form of contribution."[115] Defining indemnity is easy enough; applying it is a more difficult task.

In *Washington Gaslight Co. v. District of Columbia*,[116] the United States Supreme Court permitted "equitable indemnity" where the conduct was unintentional stating that: "it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."[117] Since *Washington Gaslight*, courts have long struggled with the process of administering justice between the parties. In determining whether one is entitled to "all" or "nothing" from a joint tortfeasor, courts frequently have applied legal litmus tests labeled "active-passive,"[118] "primary-secondary,"[119] or "direct-indirect" to the conduct of the party seeking indemnity. Although the tests continue to enjoy some currency in the legal lexicon, the "all" or "nothing" result has caused some courts to question seriously whether it is the test or the result that should be changed.[120] Called into close examination is the fairness of shifting the entire loss to one whose culpability is only marginally greater than that of another.

The response in some cases has been a judicial evolution of the venerable equitable indemnity doctrine into an equitable sharing of the loss. Whether the approach is called "partial indemnity,"[121] "comparative indemnity"[122] or "comparative

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[115] Slattery v. Marra Bros., Inc., 186 F.2d 134, 138 (2d Cir. 1951).

[116] 161 U.S. 316 (1896).

[117] *Id.* at 328.

[118] *See* Atchison, Topeka & Santa Fe Ry. v. Lan Franco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968). *See also* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 539 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 156 (1932).

[119] *See* Atchison, Topeka & Santa Fe Ry. v. Lan Franco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968). *See also* PROSSER, *supra* note 106, § 51 at 312.

[120] American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 594-95, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 192 (1978); Missouri Pacific R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 472 (Mo. 1978); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 387-88 (1972).

[121] American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 907, 146 Cal. Rptr. 182, 190 (1978); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972).

[122] American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899,

partial indemnity,"[123] the result is a distribution of the loss in direct proportion to the respective fault of the joint tortfeasors. It is a judicial sleight-of-hand; it is contribution in indemnity's clothing. Nevertheless, the apportionment of loss on the basis of relative fault is fundamentally fair.

Faithful to the exclusive remedy doctrine of worker's compensation,[124] a majority of American jurisdictions have not permitted a third party who has been sued by an injured employee to seek contribution or indemnification from a negligent employer.[125] The courts have reached this result by a variety of avenues. Some have advanced a definitional rubric. By definition, contribution requires that joint tortfeasors have a common liability to the plaintiff. Under the worker's compensation system, the employer's liability to the employee is statutory, not tortious. Therefore, some courts have held that the employer is not, by definition, a joint tortfeasor.[126] Other courts have held that an employer who has subscribed to its state worker's compensation plan and relied upon the exclusive remedy section of the statute should have his justified ex-

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912, 146 Cal. Rptr. 182, 195 (1978). *See also* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 328, 579 P.2d 441, 444, 146 Cal. Rptr. 550, 553 (1978) (supporting the holding in *American Motorcycle Ass'n* allowing comparative indemnity).

[123] American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 599, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1978).

[124] *See, e.g.*, CAL. LAB. CODE § 3602 (West 1971); GA. CODE ANN. § 114-103 (1980); ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Supp. 1980); IND. CODE ANN. § 22-3-2-6 (Burns 1974); KAN. STAT. ANN. § 44-501 (1973); MASS. ANN. LAWS ch. 152, § 24 (Michie/Law Co-op 1976); MICH. COMP. LAWS ANN. § 418.131 (1981); MINN. STAT. ANN. § 176.031 (West 1966); N.J. STAT. ANN. § 34:15-1 (West 1959); N.Y. WORK. COMP. LAW § 11 (McKinney 1965); PA. STAT. ANN. tit. 77, § 51 (Purdon 1952); WIS. STAT. ANN. § 102.03 (West 1973).

[125] *See, e.g.*, E. B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976); Georgia Power Co. v. Diamond, 130 Ga. App. 268, 202 S.E.2d 704 (1973); Liberty Mutual Ins. Co. v. Westerlind, 374 Mass. 569, 373 N.E.2d 957 (1978); Husted v. Consumers Power Co., 376 Mich. 41, 135 N.W.2d 370 (1965); Arcell v. Ashland Chem. Co. 152 N.J. Super. 471, 378 A.2d 53 (1977); Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co., 77 Ohio App. 121, 62 N.E.2d 180, *appeal dism'd*, 145 Ohio St. 614, 62 N.E.2d 251 (1945); Arnold v. Borbonus, 257 Pa. Super. 110, 390 A.2d 271 (1978); City of Beaumont v. Graham, 441 S.W.2d 829 (Tex. 1969); A. O. Smith Corp. v. Associated Sales & Bag Co., 16 Wis. 2d 145, 113 N.W.2d 562 (1962).

[126] *See generally* Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So.2d 137 (Fla. Dist. Ct. App. 1977), *rev'd per curiam*, 382 So. 2d 878 (Fla. Dist. Ct. App. 1981) (following Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490 (Fla. 1979); 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76.21 (1976).

pectation of limited and determinate liability upheld.[127] Some courts have fastened upon both rationales in upholding the exclusive remedy doctrine.

The rigidity of these approaches has produced, however, inequitable results where the employer's negligence has contributed to the employee's injury.[128] In response, courts have looked to other rationales to overcome an inequitable result. A Pennsylvania court simply disregarded the traditional definition of joint tortfeasors, defining the term instead as parties whose conduct, considered in concert, caused the plaintiff's injuries.[129] A narrow construction of the worker's compensation statute under the doctrine of *ejusdem generis* may sometimes permit a third party to proceed against the employer. For example, the Alaska statute[130] provides that worker's compensation benefits are the exclusive remedy against the employer by the "employee, his legal representatives, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer."[131] Construction under the doctrine limits that application of the statute solely to the specific class of persons enumerated; thus, "anyone" such as a third party would not be precluded from seeking contribution or indemnity.[132] In *Newport Air Park, Inc. v. United States,*[133] a federal district court narrowly construed language in the Federal Employees' Compensation Act,[134] which is essentially the same as that in the Alaska statute.[135] The court limited the scope of the statute's

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[127] Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

[128] Davis, *Third-Party Tortfeasors' Rights Where Compensation Covered Employers are Negligent — Where do Dole and Sunspan Lead?* 3 WORKMEN'S COMP. L. REV. 1 (1976)[hereinafter cited as Davis].

[129] Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318 (1966).

[130] ALASKA STAT. § 23.30.055 (1972).

[131] *Id.*

[132] *Ejusdem generis* is a doctrine of construction and interpretation of statutes, wills, etc. Basically, where general words follow a specific enumeration, the general language is construed as applying to that class of persons or things of the kind specifically mentioned. *See* BLACK'S LAW DICTIONARY 464 (5th ed. 1979).

[133] 293 F. Supp. 809 (D.R.I. 1968), *vacated on other grounds*, 419 F.2d 342 (1st Cir. 1969).

[134] 5 U.S.C.A. § 8116(c) (West 1980).

[135] *See supra* note 130 and accompanying text.

exclusive remedy provision to the class of persons named in the statute or to others similarly situated.[136] Nevertheless, other courts construing the same statute have held otherwise.[137]

Some courts that have declined to permit third party actions against the employer in the cases then before them have discussed circumstances where an action would be allowed. For example, a third party action will be allowed if a contract between the third party and the employer provides for indemnification to the former.[138] Learned Hand summarized the rule as follows:

> [W]e shall assume that, when the indemnitor and indemnitee are both liable to the injured person, it is the law of New Jersey that, regardless of any other relation between them, the difference in gravity of their faults may be great enough to throw the whole loss upon one. We cannot, however, agree that that result is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong. If so, when one of the two is not so liable, the right of the other to indemnity must be found in rights and liabilities arising out of some other legal transaction between the two.[139]

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[136] Newport Air Park, Inc. v. United States, 293 F. Supp. 809, 812 (D.R.I. 1968) *vacated on other grounds*, 419 F.2d 342 (1st Cir. 1969).

[137] *See, e.g.*, Christie v. Powder Power Tools Corp., 124 F. Supp. 693 (D.D.C. 1954), where decedent, a civilain employee of the United States was killed in the course of his employment. Pursuant to the Federal Employees Compensation Act, 5 U.S.C.A. § 8101 (West 1980), the United States paid death benefits to the decedent's estate, and the administrator of the estate brought suit against the manufacturer of the tool which discharged a metal pin, killing the decedent. The manufacturer sued the United States for contribution and indemnity. Held: The manufacturer's action is precluded by the exclusive remedy of the Act. *Id.* § 8116(c). *See also* Rhoades v. United States, 216 F. Supp. 732 (S.D. Cal. 1962), where decedents, passengers on a commercial airliner, were employees of the United States and were killed in a collision between the commercial aircraft and a military airplane. The commercial airline sued the United States, the latter having paid benefits under the Federal Employees' Compensation Act, 5 U.S.C.A. § 8101 (West 1980), for contribution or indemnity. Held: the exclusive remedy provision of the Act, section 8116(c), precluded the action.

[138] 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION §76.41 (1976).

[139] Slattery v. Marra Bros., Inc., 186 F.2d 134, 139 (2d Cir. 1951)(applying New Jersey law).

In *Husted v. Consumers Power Co.*,[140] the Michigan Supreme Court refused to allow a third party action against the plaintiff's employer for indemnity, but concluded:

> We carefully avoid deciding that there cannot be, in any circumstances of noncontractual relationship between a sued defendant and the plaintiff's employer, recovery over against the employer. . . . An obligation to reimburse can be implied by equitable principles, provided always the [third party] is without personal fault.[141]

The court further noted that "[l]oss occasioned by vicarious liability, there being no such personal fault of the one seeking indemnity or reimbursement, is an example."[142] Finally, in *Westfall v. Lorenzo Gin Co.*,[143] a Texas appellate court reaffirmed the exclusivity of remedy provided by workmen's compensation, but stated in dictum that a third party action for contribution or indemnity could be maintained where the employer has been grossly negligent.[144]

Some courts have refused to write around the exclusive remedy doctrine, preferring instead to meet the issue of equitable distribution of loss squarely. At least two jurisdictions have allowed a defendant sued by an injured employee to recover contribution from the plaintiff's employer. Illinois, a contributory negligence jurisdiction until March, 1981,[145] provides in its worker's compensation statute for an exclusive remedy to the employee or "anyone otherwise entitled to recover damages for such injury."[146] Nevertheless, in *Skinner v.*

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[140] 376 Mich. 41, 135 N.W.2d 370 (1965).

[141] 135 N.W.2d at 377.

[142] *Id. See also* Prosky v. National Acme Co., 404 F. Supp. 852 (E.D. Mich. 1975); Saad v. John E. Smith's Sons Co., 399 F. Supp. 523 (E.D. Mich. 1975) (applying Michigan Law)(Indemnity can be sought against the negligent employer where the defendant can establish that he was free from personal fault, or passively negligent).

[143] 287 S.W.2d 551 (Tex. Civ. App. — Eastland 1956, no writ).

[144] *Id.* at 554.

[145] Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

[146] ILL. ANN. STAT. ch. 48, § 138.5(a) (Smith-Hurd Supp. 1980) states as follows:

> (a) No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while en-

Reed-Prentice Division Package Machinery Co.,[147] the Illinois Supreme Court allowed the defendant/manufacturer to seek contribution from the employer.[148]

In *Skinner*, the plaintiff sued the manufacturer of an injection moulding machine alleging that a defect in the device caused her injury.[149] In turn, the manufacturer filed a third party complaint against the plaintiff's employer seeking contribution alleging misuse of the product.[150] Because the manufacturer's third party complaint contained allegations that product misuse contributed to plaintiff's injury and that the employer assumed the risk of injury, the court held that the manufacturer stated a cause of action for contribution.[151] The court stated succinctly that "[t]he fact that the employee's action against the employer is barred by the Workmen's Compensation Act . . . would not preclude the manufacturer's third-party action against the employer for indemnification . . . and should not serve to bar its action for contribution."[152]

Minnesota, a comparative negligence jurisdiction, has taken a conservative approach to contribution in a worker's compensation setting. The Minnesota statute,[153] like that of Illinois, provides for an exclusive remedy.[154] Nevertheless, the Minnesota Supreme Court in *Lambertson v. Cincinnati Corp.*,[155] al-

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> gaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

Id.

[147] 70 Ill. 2d 1, 374 N.E.2d 437 (1977).

[148] 374 N.E.2d at 443.

[149] *Id.* at 438.

[150] *Id.*

[151] *Id.* at 443.

[152] *Id.*

[153] MINN. STAT. ANN. § 176.031 (West 1966).

[154] *Id.*

> The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employe [sic], his personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death. . . .

Id.

[155] 312 Minn. 114, 257 N.W.2d 679 (1977).

lowed a limited form of contribution by the manufacturer against the employer.[156] In *Lambertson*, the plaintiff brought a products liability action against the manufacturer of a brake press for injuries sustained when the press crushed his arm.[157] The manufacturer impleaded Lambertson's employer for contribution.[158] At trial, the jury found the plaintiff to have contributed fifteen percent to the cause of the accident, the manufacturer twenty-five percent, and the employer sixty percent.[159] Further, it fixed the plaintiff's damages at $40,000.[160] The trial court awarded Lambertson $34,000, but denied the manufacturer contribution from the employer.[161]

The appellate court noted the interest of the manufacturer in limiting its liability to the percentage of fault ascribed to it, and that the methods of securing restitution and a fair apportionment of damages are contribution and indemnity.[162] Though the court recognized the equity inherent in contribution and the inequity in foisting the entire loss on the manufacturer where it has contributed only twenty-five percent to the cause of the accident, the expectation of the employer in limited liability could not be totally disregarded.[163]

Balancing the equities, the court allowed the manufacturer to recover contribution from the employer up to the amount of worker's compensation benefits[164] and concluded:

> This approach allows the third party [manufacturer] to obtain limited contribution, but substantially preserves the employer's interest in not paying more than worker's compensation liability. While this approach may not allow full contribution recovery to the third party in all cases, it is the solution we consider most consistent with fairness and the various statutory schemes before us.[165]

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[156] 257 N.W.2d at 689.
[157] *Id.* at 682.
[158] *Id.* at 684.
[159] *Id.* at 683.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 685.
[163] *Id.* at 688-89.
[164] *Id.* at 689.
[165] *Id. See also* Santisteven v. Dow Chem. Co., 506 F.2d 1216 (9th Cir. 1974)(apply-

In the much celebrated case[166] of *Dole v. Dow Chemical Co.*,[167] a New York appellate court recognized that the New York worker's compensation statute[168] provided an exclusive remedy.[169] Nevertheless, the court held that, in a suit by the widow of an employee against a third party manufacturer, the manufacturer could implead the employer who was partially responsible for the accident and recover an amount equal to the employer's percentage share of fault.[170]

The courts in *Skinner*, *Lambertson*, and *Dole* moved toward the same objective: allowing the third party some measure of recovery against the negligent employer—searching, in the language of the court in *Skinner*, for "better solutions."[171] In the face of exclusive remedy statutes,[172] the court in *Skinner* allowed *contribution based on proportional fault*,[173] while the *Dole* court permitted *indemnity based on apportioned fault*.[174] Nevertheless, whether clothed in terms of contribu-

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ing Nevada law)(allowed contribution to the extent of worker's compensation benefits).

[166] *See* Davis, *supra* note 128, at 1 n.1.

[167] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[168] N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1981).

[169] 30 N.Y.2d at 152, 282 N.E.2d at 295, 331 N.Y.S.2d at 390. The statute provides:

> The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . .

N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1981).

[170] 30 N.Y.2d at 152-53, 282 N.E.2d at 295, 331 N.Y.S.2d at 390-91.

Florida's exclusive remedy statute, FLA. STAT. ANN. § 440.11 (West 1981), is not a bar to a third party seeking indemnity from an employer, Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975), if the third party is "vicariously, constructively, derivatively or technically liable" to the employer. Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 (Fla. 1979). Nevertheless, a third party may not seek contribution from an employer, because there is no common liability to the plaintiff/employee. Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So. 2d 137, 139 (Fla. Dist. Ct. App. 1977), *rev'd per curiam*, 382 So. 2d 878 (Fla. Dist. Ct. App. 1981) (following Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490 (Fla. 1979).

[171] Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437, 438 (1977).

[172] *See supra* notes 146 and 168.

[173] Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437, 442-43 (1977).

[174] Dole v. Dow Chem. Co., 30 N.Y.2d 143, 152-53, 282 N.E.2d 288, 294-95, 331

tion or indemnity, the result is the same: the third party is allowed to recover damages from the employer to the extent of the employer's percentage of fault. The court in *Lambertson*, however, was more deferential to the traditional underpinnings of worker's compensation in its search for a "better solution." Rather than totally disregarding the employer's expectation of limited exposure, the court sought a middle ground, settling ultimately on a rule that permits contribution up to the amount of worker's compensation benefits.[175]

The *Skinner-Dole* approaches do violence to a basic premise of worker's compensation that, in return for the guaranteed payment of compensation benefits to an employee, the employer justifiably expects liability that is both limited and determinate.[176] The *Lambertson* approach preserves intact the employer's expectations, but it requires the third party frequently to pay more than its percentage fault. With each of these inequites in mind, we propose a system that not only will uphold the justified expectations of the employer and employee, but also limit the liability of the third party to its percentage of fault.

V. The Case for Comparative Causation

The *Skinner*, *Dole*, and *Lambertson* cases illustrate how courts have wrestled with balancing the equities in employee-employer-product manufacturer cases in the face of exclusive remedy worker's compensation statutes. Cases frequently arise, however, with additional variables. Therefore, we need a system that can equitably resolve not only the *Skinner-Dole* cases, but also cases involving negligent parties, intentional tortfeasors, and parties who settle or become insolvent, before or after trial.

We submit that the most equitable procedure for assessing responsibility and distributing loss in an employee's action against third parties is apportionment on the basis of compar-

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N.Y.S.2d 382, 390-92 (1972).

[175] Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679, 689 (1977).

[176] *See supra* note 127 and accompanying text.

ative causation.[177] Under comparative causation, the trier of fact will determine the employee's damages and the percentage of the damages caused by each party, but the manner in which each party bears his share of the damages differs as follows:

1. A third party will bear only the percentage of the damages it caused;

2. A settling party will bear only the amount it chooses to bear through settlement, regardless of the percentage of the damages it caused;

3. An insolvent party will bear no share of the loss, regardless of the percentage of the damages it caused;

4. An employer will bear only the amount paid in worker's compensation benefits, regardless of the percentage of the damages it caused;

5. An employee will always recover the worker's compensation benefits, regardless of the percentage of the damages caused by himself. In addition, the employee will recover the percentage of the damages caused by a solvent third party and the amount accepted from a settling party. Simply stated, the comparative causation approach requires each party to bear its share of the employee's damages, but the manner in which each party discharges the responsibility for its share of the fault will vary.[178] Prior to illustrating the application of the comparative causation doctrine in hypothetical cases, we will examine some decisions, statutes, and commentary that clarify the doctrine.

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[177] *See generally* Davis, *supra* note 128, at 9. *See also* Murray v. United States, 405 F.2d 1361, 1365-66 (D.C. Cir. 1968)(while a defendant/third party, sued by the plaintiff/employee, may not sue a negligent employer for contribution, the common law recovery of the employee should be reduced by fifty percent in view of the employer's negligence and the worker's compensation relationship between the employee and employer).

[178] Under the comparative causation formulation, the liability of the parties to the employee is several and not joint. Nevertheless, if the trier of fact determines that the fault of two or more parties is coextensive, i.e., inseparable from the standpoint of causation, then necessarily the liability as between or among these parties is joint and several. For example, if two parties act in concert to injure the employee, liability is joint and several as between the parties in concert. Additionally, where one is vicariously liable for another's fault, the liability as between the party at fault and the party vicariously liable is joint and several.

At least one court to date has adopted comparative causation. In *Barron v. United States*,[179] plaintiff sustained injury while engaged in construction work at a naval shipyard and brought suit, pursuant to the provisions of the Federal Tort Claims Act[180] against the United States. The latter, in turn, impleaded plaintiff's employer for contribution.[181] Although the employer's negligence contributed to its employee's injury, the employer was shielded by the exclusive remedy provision of the Hawaii worker's compensation statute.[182] Recognizing this limitation on the United States to recover from the employer on its third party action, the federal district court said:

> The logical, as well as the fair and reasonable, result is for the Court to determine the percentage of fault attributable to the government and apply the resulting percentage to the damages sustained by plaintiff.
>
> The principle of comparative fault among joint tortfeasors and its use in fixing the amount of contribution is well established. If comparative fault can be determined for purposes of contribution, it can be determined as well to ascertain the proportion of damage to be assessed against one of two tortfeasors where the other has been immunized against liability.[183]

A like approach has been espoused in Texas. The authors of "Special Project—Texas Tort Law in Transition"[184] note that the employer and employee have voluntarily waived their common law rights and remedies and have substituted in their place the provisions of the worker's compensation statute.[185] Therefore, when the conduct of the employer and third party combine to produce the employee's injury, the third party

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[179] 473 F. Supp. 1077 (D. Hawaii 1979), *modified*, 654 F.2d 644 (9th Cir. 1981).

[180] 28 U.S.C.A. § 1346(b) (West 1976).

[181] 473 F. Supp. at 1085.

[182] *Id. See* HAWAII REV. STAT. § 386-5 (1976).

[183] 473 F. Supp. at 1088. *Cf.* Sugue v. F. L. Smithe Mach. Co., 56 Hawaii 598, 546 P.2d 527 (1976)(comparative causation adopted by implication). The court rejected the imposition of liability on a non party employer. Nevertheless, *Barron* holds that, because of the exclusive remedy protection afforded the employer under Hawaiian law, a third party plaintiff has no right of contribution from the employer. Therefore, *Sugue* would seemingly allow a determination of the third party's percentage of fault.

[184] Special Project, *Texas Tort Law in Transition*, 57 TEX. L. REV. 381 (1979).

[185] *Id.* at 441-42. *See* Paradissis v. Royal Indem. Co., 507 S.W.2d 526 (Tex. 1974).

should not be liable for that percentage of fault attributable to the employer; rather, the Texas worker's compensation statute[186] and comparative negligence statute[187] should be construed together, and the third party's liability should be limited to his degree of fault.[188] Thus, "[t]he . . . employer should be treated procedurally like a 'settled but joined' party under . . . [the comparative negligence statute] . . .; the immunity would act as 'a complete release of the portion of the judgment attributable to . . . [the employer].' "[189]

Third party actions brought by injured employees often involve products liability claims, thus injecting the additional problem of strict liability into the lawsuit.[190] The question therefore arises: in assessing the relative fault of the third-party manufacturer and the employer, how should the trier of fact balance the manufacturer's strict liability in tort and the employer's negligence? We submit that the comparative causation approach easily accommodates the introduction of a strict liability issue into the equation, because the focus of the approach is on *causation*, so it matters not whether the employee's injury was caused by negligence or a defective product. Some have argued that the balancing effort is a vain attempt to compare "apples and oranges."[191] Nevertheless, in *Safeway Stores, Inc. v. Nest-Kart*,[192] the California Supreme Court found that the suggested problems were "more theoretical than practical" and noted that other jurisdictions have

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[186] TEX. REV. CIV. STAT. ANN. art. 8306 (Vernon Supp. 1980).

[187] TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

[188] Special Project, *Texas Tort Law in Transition*, 57 TEX. L. REV. 381, 442 (1979).

[189] *Id.*

[190] Pursuant to Section 402A of the American Law Institute's Restatement (Second) of Torts, now adopted in the majority of American jurisdictions, *see* Walkowiak, *Product Liability Litigation and the Concept of Defective Goods: "Reasonableness" Revisited?*, 44 J. AIR. L. & COM. 705, 706-07 n.7 (1979), a manufacturer, having designed, manufactured, or marketed an unreasonably dangerous product is strictly liable to the consumer for injuries resulting from its use. *See, e.g.*, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Shamrock Fuel & Oil Co., Inc. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

[191] *See, e.g.*, Boone, *Comparative Negligence: Solution or Problem?*, 17 CAL. TRIAL LAW J. 33 (1975); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No Fault*, 14 SAN DIEGO L. REV. 337 (1977).

[192] 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

found juries to be competent to compare effectively strict liability and negligence.[193]

In *Nest-Kart*, a case not involving worker's compensation, the plaintiff was injured when a supermarket shopping cart collapsed on her foot.[194] She sued the supermarket, the shopping cart manufacturer, and a cart repairer on strict liability and negligence theories.[195] The defendants affirmatively pleaded contributory negligence on the part of plaintiff.[196]

The jury found the plaintiff and the cart repairer free of fault, the supermarket liable on strict liability and negligence theories, and the manufacturer liable under strict liability.[197] Further, it found that the supermarket and manufacturer were eighty percent and twenty percent liable, respectively.[198] The supermarket, in turn, moved for contribution from the manufacturer in the amount of thirty percent, which, if awarded, would equalize the amount of contribution *pro rata*, pursuant to the common law rule.[199] The trial court granted the supermarket's motion.[200]

The issue ultimately presented on appeal was whether the comparative fault doctrine announced in *Li v. Yellow Cab Co.*[201] required an apportionment of damages between joint tortfeasors found to be negligent and strictly liable.[202] In responding affirmatively and reversing the trial court, the court stated, "[e]ven when an injury was in part caused by a defective product, fairness and good social policy [dictate] a sharing or apportionment of liability."[203] Moreover, the court noted that the rule of strict products liability does not require

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[193] *Id.* at 331, 579 P.2d at 446, 146 Cal. Rptr. at 555. *See generally* Noble v. Desco Shoe Corp., 41 A.D.2d 908, 343 N.Y.S.2d 134, 136 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866, 871-73 (1973); Gies v. Nissin Corp., 57 Wis. 2d 371, 204 N.W.2d 519, 526-27 (1973).

[194] 21 Cal. 3d at 325, 579 P.2d at 442, 146 Cal. Rptr. at 551.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 326, 579 P.2d at 442, 146 Cal. Rptr. at 551.

[198] *Id.*

[199] *Id.* at 326, 579 P.2d at 443, 146 Cal. Rptr. at 552.

[200] *Id.* at 327, 579 P.2d at 443, 146 Cal. Rptr. at 552.

[201] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[202] 21 Cal. 3d at 325, 579 P.2d at 442, 146 Cal. Rptr. at 551.

[203] *Id.* at 329, 579 P.2d at 444, 146 Cal. Rptr. at 553.

that negligent tortfeasors escape liability.[204]

Practically, the jury can be instructed to assess the comparative cause of the injury, taking into consideration all independent and concurrent causes, whether flowing from negligence or strict liability, and thereafter apportion fault on a percentage basis.[205] The court in *Nest-Kart* noted that the apportionment calculation calls upon the jury to make a common sense determination, a function readily performable by juries.[206] In view of the above, the question initially posed can be readily answered: using its common sense, the jury will assess the degree to which the strictly liable manufacturer, the negligent employer, and the employee himself caused the employee's injury.

Finally, there remains the procedural issue of whether a settling party or negligent employer whose liability is settled by statutory worker's compensation benefits must be joined by the plaintiff or defendant/manufacturer as a party defendant, given the fact that neither the settling party nor the employer will be exposed to liability for damages, contribution, or indemnity under the comparative causation approach. Dean Page Keeton has observed that:

> [the] failure to join an alleged settling tortfeasor neither precludes nor, arguably, should it preclude the submission of the existence or amount of his negligence. The determination of the existence or amount of his negligence is in no way dependent on his being a party, and there is no value in making him a formal party to the litigation except for procedural and tactical reasons on the part of the claimant or defendants.[207]

A Texas appellate court in *Deal v. Madison*[208] implied that joinder of the employer is not necessary, as no finding of negligence in his absence could bind him. Further, we add that

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[204] *Id.* at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554.

[205] Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 725 (1974).

[206] 21 Cal. 3d at 331-32, 579 P.2d at 446, 146 Cal. Rptr. at 555.

[207] Keeton, *Annual Survey of Texas Law — Private Law: Torts*, 28 Sw. L.J. 1, 14 (1974).

[208] 576 S.W.2d 409 (Tex. Civ. App. — Dallas 1978, writ ref'd n.r.e.).

any fault attributable to the employer has already been satisfied by the worker's compensation benefits received by the employee. Finally, because the purpose of comparative causation is not to bind the employer, but to determine the third party's degree of fault, joinder of the employer is absolutely unnecessary.[209]

To illustrate the application of the comparative causation approach, let us assume that an air taxi pilot was totally and permanently disabled in the crash of a twin engine aircraft owned and operated by his employer. The background of the crash unfolds as follows: the aircraft was refueled by a fixed base operator located adjacent to the hanger housing the air taxi operation. The linemen who refueled the aircraft had previously sold all of his fuel with the proper octane rating for the air taxi aircraft's engines. Eager to make another sale, he intentionally pumped fuel with a lower octane rating than was specified by the pilot and required for the engines, and billed the air taxi operation for fuel with the higher rating.

Shortly after takeoff, one engine failed and the second began to run erratically. The pilot elected to return to the airport and had it in sight when the hydraulic pump on the operating engine failed. As a result, the landing gear could not be lowered normally. The pilot attempted to execute a missed approach to gain the time and altitude necessary to lower the gear manually. On the missed approach, the aircraft was seen by ground witnesses to roll abruptly in the direction of the failed engine and crash moments later. On impact, the shoulder harness attach fitting pulled loose from its anchor, and as a result, the pilot's head contacted with the instrument panel and the glare shield.

The pilot brought suit against the following:

1. The refueler, alleging intentional tortious conduct;

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[209] *Id.* at 415. The same result will be reached where the plaintiff/employee is injured, in part, through the fault of multiple third parties, and one settles with the plaintiff. The jury will calculate the percentage of fault attributable to each party, whether or not joined, and the liability of the non-settling third party will ultimately be limited to its share of fault. Thus, through settlement with one of the third parties, the plaintiff may recover a sum greater or less than the percentage of his damages caused by the settling party.

2. The facility that overhauled the hydraulic pump two weeks prior to the crash, alleging it negligently failed to reinstall a critical component;

3. The pump manufacturer, alleging it to be strictly liable on the grounds that the pump could have been designed, at little additional cost, in a manner that would not have required the part that was allegedly omitted by the repair facility; and

4. The aircraft manufacturer, alleging it to be strictly liable on a crashworthiness theory.

All the defendants alleged that the employee negligently failed to maintain proper airspeed during the execution of the missed approach. All defendants brought third party actions against the pilot's employer alleging that the employer failed to instruct the pilot properly in emergency procedures. Prior to trial, the refueler settled the suit with the employee/pilot for $175,000. Shortly after trial, the pump manufacturer became insolvent. The employee received $50,000 in worker's compensation benefits[210] and at trial the trier of fact determined the employee's damages were $1,000,000. The fault of

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[210] *See, e.g.*, CAL. LAB. CODE §§ 4453, 4659 (West Supp. 1981) ($175.00 per week for the length of the disability); GA. CODE ANN. § 114-404 (1981) ($110.00 per week for the length of the disability); ILL. ANN. STAT. ch. 48, § 138.8(b)(2), (6) (Smith-Hurd Supp. 1981-82) ($376.33 per week for the length of the disability); IND. CODE ANN. § 22-3-3-10, -22 (Burns Supp. 1981) ($140.00 per week for 500 weeks); KAN. STAT. ANN. §§ 44-510(c), 44-511 (1980) ($170.00 per week for the length of the disability); MASS. ANN. LAWS ch. 151A § 29, ch. 152 § 34A (Michie/Law. Co-op. 1981) ($245.48 per week for life); MICH. STAT. ANN. §§ 418.351, .355 (West Supp. 1981) ($210.00 per week for 800 weeks); MINN. STAT. ANN. §§ 176.101(4), 176.011(20) (West Supp. 1981) ($244.00 per week for the length of the disability); N.J. STAT. ANN. §§ 34:15-12, 43:21-19 (West Supp. 1981-82) ($199.00 per week for 450 weeks, subject to possible extension); N.Y. WORK. COMP. LAW § 15(6) (McKinney Supp. 1981-82) ($215.00 per week for the length of the disability); OHIO REV. CODE ANN. §§ 4123.58, 4123.62 (Page 1980) ($183.33 per week for life); PA. STAT. ANN. tit. 77, §§ 501, 582 (Purdon Supp. 1981-82) ($262.00 per week for the length of the disability); TEX. REV. CIV. STAT. ANN. art. 8306 §§ 10, 29 (Vernon Supp. 1981) ($133.00 per week for 401 weeks); WIS. STAT. ANN. §§ 102.11, .43, .44, 102.11, 108.05 (West Supp. 1981-82) ($249.00 per week for life). Figures were supplied by the worker's compensation commissions in the above jurisdictions as of February 26, 1981.

each party was found to be as follows:

Party	Percentage of Fault
Employee	5
Employer	10
Pump overhauler	15
Pump manufacturer	20
Aircraft manufacturer	25
Refueler	25
Total	100

The employee's recovery would be as follows:

Source	Amount
Worker's Compensation	$ 50,000
Pump overhauler (15% x $1,000,000)	150,000
Pump manufacturer (insolvent)	0
Aircraft manufacturer (25% x $1,000,000)	250,000
Refueler (settlement)	175,000
Total	$625,000

As the above figures illustrate, the employee's potential recovery was reduced by his share of the fault, or $50,000. Further, the worker's compensation benefits were less than the damages multiplied by the employer's percentage of fault, the former being $50,000, the latter, $100,000. Similarly, the employee settled with the refueler for an amount less than the damages multiplied by the refueler's percentage of fault, the former being $175,000, the latter $250,000. Finally, the pump overhauler and the aircraft manufacturer paid their percentage shares, and no portion of the pump manufacturer's share was paid by any other party.

The results are dramatically altered by assuming a relatively low damage award at trial in relation to the worker's compensation benefits. In the preceding example, assume that the worker's compensation benefits were $100,000 and the damages were found to be $200,000. The altered result would be as follows:

Source	Amount
Worker's compensation	$100,000
Pump overhauler (15% x $200,000)	30,000

Pump manufacturer	0
Aircraft manufacturer (25% x $200,000)	50,000
Refueler	175,000
Total	$355,000

Once again, the employee's potential recovery was reduced by his share of the fault. Unlike the preceeding example, the worker's compensation benefits greatly exceeded the damages multiplied by the employer's percentage of fault; the former being $100,000, the latter, $20,000. In this case, the refueler's settlement was considerably greater than the damages multiplied by the refueler's percentage of fault; the former being $175,000, the latter, $50,000. Again, the pump overhauler and the aircraft manufacturer paid only their percentage shares, and the pump manufacturer paid nothing.

In view of the fact that thirty-six jurisdictions have adopted some form of comparative negligence or fault, few would argue that the employee's recovery should not be reduced by the share of fault attributable to him. Few also would argue that the worker's compensation benefits may properly be either more or less than the damages multiplied by the employer's percentage of fault, because the benefits are fixed by statute and constitute the expectations of the parties situated in the worker's compensation system. Similarly, the employee who settles with the refueler cannot complain if the settlement is less than the damages multiplied by the refueler's percentage of fault, because the employee certainly controls the settlement and arguably is best able to assess his own damages.[211] Controversy, if any, will likely arise over the fact that the employee cannot recover the insolvent's share from the solvent parties. The result, however, is no different from the case where there is but one defendant, and he is insolvent, or a case where the employee settles with one party and obtains a judgment against a non-settling party who becomes insolvent.

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[211] The non-settling party's liability is reduced by the settling party's percentage of fault rather than by the amount of settlement. Therefore, plaintiff will be motivated to settle at or near the value it perceives to be the settling party's percentage share of fault. Said otherwise, where settlement occurs, it will more likely be made in good faith and free from collusion between the plaintiff and settling defendant.

Nevertheless, the employee is never left without a recovery. He always receives one hundred percent of the worker's compensation benefits even if he is one hundred percent at fault.

From the examples, we can see that the comparative causation approach works regardless of the cast of characters, whether employee, employer, strictly liable manufacturer, negligent party, intentional tortfeasor, solvent, or insolvent. Each party pays only for his share of the damages; although, as we have said, the manner in which each party "pays" his share will differ.

VI. Reimbursement to Employer

Thus far we have considered the distribution of the employee's loss among all the parties in the worker's compensation and tort systems. We have not considered a redistribution of the loss within the worker's compensation system.[212] Whether the employer who is less than totally at fault should be permitted reimbursement for the benefits paid depends, conceptually, upon one's view of the intersection of the worker's compensation system with the tort system.[213] If one views the bargain struck between the employee and employer in the worker's compensation system as including the duty of the employer to provide benefits and the concomitant right of the employee to retain the benefits, then reimbursement to the employer is neither required nor allowed. Alternatively, if one views that equity entitles the employer as well as the employee to step beyond the boundary of the worker's compensation system and into the tort system, reimbursement of the employer should be permitted,[214] but only to the extent of the

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[212] This includes the employer's worker's compensation insurance carrier or state insurance fund.

[213] Irrespective of one's view on the desirability of employer reimbursement, many worker's compensation statutes at present require a return of the benefits to the employer if the employee recovers from third parties amounts greater than the amount of the benefits. *See, e.g.*, Cal. Lab. Code § 3856 (West 1971); Fla. Stat. Ann. § 440.39 (West 1981); Ill. Ann. Stat. ch. 48, § 138.5 (Smith-Hurd Supp. 1981-82); N.Y. Work. Comp. Law § 29 (McKinney Supp. 1981-82); Tex. Rev. Civ. Stat. Ann. art. 8307 § 6a (Vernon Supp. 1980-81); Wis. Stat. Ann. § 102.29 (West Supp. 1981-82).

[214] At least there is a certain symmetry achieved in permitting the employer as well as the employee to cross the worker's compensation boundary into the tort system.

fault not assigned to the employer, multiplied by the worker's compensation benefits. Clearly the equitable argument for reimbursement becomes more compelling where the employee is held to have contributed to his injury. Another approach within the reimbursement alternative is suggested. Rather than reimburse the employer on the basis of the fault assigned to the employee and third parties, reimbursement may more fairly be predicated upon the ratio of the employee's fault to the employer's fault, multiplied by the worker's compensation benefit.

Both the second and third formulations necessarily inject notions of fault back into the no-fault compensation system: the first, by comparison of the fault of all parties as determined in the tort system; the second, by the comparison solely of the fault of the employer and employee, but on the basis of the fault of each as determined in the tort system. For an illustration of the differences, assume the facts of the first case in the preceding section. The results in the three approaches are as follows:

First Approach — No Reimbursement

Tort recovery	$575,000
Worker's compensation	50,000
Employee net recovery	$625,000

Second Approach — Reimbursement Based Upon Non-Employer Fault

Worker's compensation benefits multiplied by Non-Employer fault = Employer reimbursement

$50,000 x 90% = $45,000

Tort recovery	$575,000
Worker's compensation	50,000
Employee gross recovery	$625,000
Employer reimbursement	45,000
Employee net recovery	$580,000

Third Approach — Reimbursement Based Upon Ratio of Employee Fault to Employer Fault

Ratio of Employee fault to Employer fault is 5/10%	=0.5[215]	
Worker's compensation benefits multiplied by Employee/Employer ratio	=Employer reimbursement	
$50,000 x 0.5	=$25,000	
	Tort recovery	$575,000
	Worker's compensation	50,000
	Employee gross recovery	$625,000
	Employer reimbursement	25,000
	Employee net recovery	$600,000

In each approach, solvent third parties will pay their shares by settlement[216] or satisfaction of judgment. In the first approach, the employee retains all of the tort recovery plus the worker's compensation benefits. In the second and third approaches, a portion of the worker's compensation benefits is returned to the employer through the vehicle of the employee's tort recovery.[217] Irrespective of whether the reimbursement is described theoretically as contribution or partial indemnity from third parties or a return to the employer of a portion of the worker's compensation benefits received by the employee, the net result of reimbursement is a reduction of the total net recovery by the employee.

VII. IMPLEMENTATION

We have offered proposals for the judicial handling of the task of balancing the rights of the employee, employer, and

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[215] As is readily apparent, the ratio will produce a number equal to or greater than "1" where the employee's fault is equal to or greater than the employer's fault. In no event, however, should "reimbursement" exceed the total worker's compensation benefits.

[216] Obviously, if all parties in the tort system settle, there can be no reimbursement to the employer in the second and third approaches as there can be no trial to determine damages and percentage of fault of the parties in both the worker's compensation and tort systems.

[217] If the employer, not joined by the employee, sues a third party, the fault of the third party, the employer, and the absent employee will be determined on the basis of comparative causation, but the employer cannot recover more than the worker's compensation benefits it paid.

third parties. We fully recognize that the boundaries imposed by statute in some jurisdictions may well constrain some courts in the implementation of the comparative causation approach. Specifically, in some jurisdictions, implementation may be delayed until there are legislative amendments in the following areas:

1. Joint and several liability;
2. Contributory negligence or comparative negligence whether so called "forty-nine" (or "fifty-one"), "fifty," or "pure" type;
3. The characterization of a fellow employee as a third party;
4. Guaranteed minimum recovery of the employee in a successful third party suit regardless of an employer's right of reimbursement;
5. Notice requirement of an employee to the employer of his settlement with or suit of a third party; and
6. Automatic assignment of an employee's cause of action to the employer or its subrogee.

The list is by no means exhaustive. Additionally, we recognize that a full discussion of any topic listed above is beyond the scope of the article. Nevertheless, implementation of the comparative causation approach would require minimal modifications within the tort system, principally in the contributory negligence jurisdictions or jurisdictions in which comparative fault is applied on other than a "pure" basis. The rule of joint and several liability will not prevent the implementation of the approach; rather, the imposition of several, but not joint, liability will alter the employee's total recovery in the tort system in the event of an insolvent defendant. Additionally, the comparative causation approach can be implemented in concert with existing worker's compensation statutes, although the present statutes may require, alter, or prevent the redistribution of a portion of a tort recovery within the worker's compensation system.

We submit that the comparative causation approach equitably handles the problems that exist where the worker's compensation system intersects the tort system, without dis-

turbing the internal workings of the former. We have, additionally, proposed two approaches for equitable redistribution of the tort recovery within the worker's compensation system.

VIII. CONCLUSION

The worker's compensation system has grown to maturity during our century. It guarantees a recovery to the injured employee even if the employee was totally at fault. It also upholds the employer's justified expectations of limited and determinate liability, and we have noted the importance of the continued affirmance of the employer's expectations. Further, we have emphasized the inequity that results from the imposition of liability on a third party in excess of its percentage of fault. Finally, we have offered proposals for the judicial handling of the task of balancing the rights of the employee, employer, and third parties where those who are situated in the worker's compensation system have crossed over into the tort system, and we have offered suggestions for the redistribution of a tort recovery within the worker's compensation system.

We fully recognize that a court's implementation of the comparative causation approach for balancing the rights of all parties in the worker's compensation and tort systems may well be constrained by existing statutes. Nevertheless, we believe that the inequities inherent in the present worker's compensation and tort systems should prompt courts to follow the innovative path taken by the court in *Barron* in adopting the comparative causation approach. We submit that the adoption of the approach would significantly contribute to the achievement of the ultimate goal of equitable distribution of loss within the two systems.